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Steadman Eterprises, Inc., Virgil O. Steadman and Rodney v. Steadman v. Richard Brown and Darlene Brown : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STEADMAN ENTERPRISES, INC., VIRGIL O. STEADMAN and RODNEY V. STEADMAN, Plaintiffs-Respondents	:	BRIEF OF APPELLANT
v.	:	Case No. 20832 860141-CA
RICHARD BROWN and DARLENE BROWN, Defendants-Appellants.	:	

APPEAL FROM THE JUDGMENT OF THE THIRD DISTRICT COURT

SALT LAKE COUNTY, THE HONORABLE JAMES S. SAWAYA, JUDGE

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STATEMENT OF THE CASE

Nature. This is an appeal from a jury verdict for damages allegedly suffered by the respondents when unknown criminals burglarized their store. At the time of the loss, respondents were renting on a monthly basis the premises from appellant.

Course and disposition in court below. On September 12, 1984, respondents filed their complaint in the court below based on the negligence of appellant in renting to a particular tenant or in making holes in the floor of an apartment above the jewelry store for repair work. (R. 8-11). The case was assigned to the Honorable James S. Sawaya.

The matter was tried before a jury from May 21-24, 1985. At the close of the respondents' case, appellant moved for a directed verdict. (R. 553-555). The Court denied the Motion for Directed Verdict. (R. 561-562).

The jury returned a verdict in favor of the respondents. Judgment was entered on the verdict. (R. 216-218).

STATEMENT OF FACTS

Respondents brought this action in the court below when unknown criminals burglarized their jewelry business. The thrust of their complaint was that the appellant was negligent in renting to a particular tenant of reputed bad character and in cutting holes in a floor in an apartment above their business. (R. 2-7, 44-46).

Entry into the store was made through Apartment 214, which was directly above the store. (R. 278). This was one of the four apartments which were directly above the respondents' store. (R. 353, 612). Appellant had cut several holes in the wood floor of Apartment 214 to locate water leaks and repair the pipes. (R. 224, 643). Appellant was remodelling the upstairs floor and was changing the entire layout of that particular apartment. (R. 382, 645). During that remodelling, the door to Apartment 214 was usually kept locked. (R. 339).

There were three layers of flooring between the apartment and the respondents' sales area. There was the wood floor of the apartment, approximately 14 inches below that layer was a three-quarter inch layer of lath

and plaster, consisting of one-half inch plaster and one-quarter inch wood, and below that was the false ceiling to the respondents' store. (R. 225-27, 648-49). Appellant worked on the piping in the space between the apartment's floor and the lath and plaster, having never penetrated the lath and plaster into the respondents' store. (R. 227, 647-50, 658). He did not penetrate into the lath and plaster because all of the repairs were effected above it and he assumed the respondents had the ceiling tied into their burglar alarm. (R. 648-49).

The evening before the burglary, appellant had been unable to enter Apartment 214. He discovered someone had entered the room without permission. (R. 231-34). He entered the room and examined it. No one was present and nothing was disturbed. (R. 231-34). He then locked the windows and the door. (R. 234-37, 350-54). He had assumed a transient had sought shelter from the winter storm, but he did not see any unauthorized persons in the area. (R. 237, 354). Later that evening, the apartment manager unlocked the room and made an examination. He found all was secure, including the windows and door. (R. 370, 377-79, 388). He also saw no strangers in the area. (R. 337).

The next morning, the manager went to the room to continue the reconstruction and discovered someone had burglarized the apartment by breaking a locked window and entering. (R. 371). He also found the burglars had penetrated the lath and plaster layer and entered the jewelry store with a rope ladder. (R. 371). He called the police department. (R. 372).

The Murray Police Department responded to the scene. The investigation revealed the burglars were a sophisticated group. (R. 219). Detective Christensen of the Murray Police Department had never seen this sophisticated of a group of thieves, even though he had investigated hundreds of burglaries. (R. 213). The thieves "shaved" the alarm boxes, both the inside and outside. (R. 312). They were able to deactivate the burglary system. Apparently, a circular saw was used. (R. 312). He checked with the burglar alarm company which had installed the security system, and its personnel could not assist him with the method of "shaving." (R.313). Neither the police department or the alarm company possessed this type of instrument. (R. 313, 580). The police could not locate fingerprints and assumed gloves had been used by the group of thieves. (R. 296, 307-09). The thieves carried off a safe,

which would have taken two to three persons, according to the police officer (R. 309-10), and possibly an excess of four persons, according to respondent Virgil Steadman (R. 453). The burglars came well prepared in that they brought with them railroad ties to help load the safe onto a vehicle. (R. 308). These ties were left at the scene and were examined by the apartment manager as well as the police. The apartment manager testified that the railroad ties had not been used in the reconstruction process and these particular ties were not present before the discovery of the burglary. The ties had been cut into a wedge shape in order to facilitate rolling a safe up them. (R. 382-85; Ex. 5).

The thieves were also of sufficient sophistication that they avoided the internal sensors of the store. They avoided the trip devices located in the display cases which contained merchandise (R. 302, 448, 479, 480), and under the floor pads, (R. 303, 450, 479). In fact, the group was sophisticated enough to avoid that part of the ceiling which had been "bugged" by the respondents. (R. 451-53). They had armed about a 10 by 20 foot area of their 20 by 60 foot ceiling because of a previous burglary attempt which had occurred before

appellant had bought the building. (R. 492-93, 495-96). The thieves also avoided the armed floor pad and display cases directly underneath their ladder. (R. 484-85). Infact, they stepped onto that case in descending into the store.

The crime has never been solved. (R. 218, 443).

SUMMARY OF ARGUMENTS

1. A landlord owes no duty to a commercial tenant under a monthly tenancy. The tenant accepts the premises "as is." It is the tenant's obligation to examine the premises for their adequacy and any potential problems they may present. In fact, no testimony regarding the duty of the landlord was ever adduced at trial through any of the witnesses. No standard was articulated to the jury in terms of any instructions.

2. A landlord is not the insurer of the safety of his tenant and cannot be obligated to protect that tenant from the criminal attacks of unknown third parties. Under the facts of this case, appellant landlord has been made the guarantor of the respondent tenants' safety, without any evidence showing he acted unreasonably.

3. The proximate cause of the respondents' damages was the burglary committed by unknown third parties. The court erred when it failed to give the

instructions requested by appellant regarding the duty of care of a landlord and the instructions relating to intervening cause. Moreover, there was no evidence the burglars and their success were connected to the respondent. Since the court never defined the duty of the respondent, the jury was left with no standard by which to judge the acts or failure to act of the respondent and compare that to the criminal attacks of the intervening third parties.

4. The respondents' entire evidence of damages consisted of a list prepared after the burglary and for which no adequate foundation was laid for its submission. There was no evidence qualifying any of their witnesses to give value of the items on that list. This is not the typical case of an owner testifying to value of a possession. Even if such were the circumstance, there must be foundation for that opinion. In this case, precious gems, metals, and jewelry were the items lost. These materials' values are not within the knowledge of the average person. Their values must be established by competent expert testimony. The list further did not qualify as a summary document since no adequate foundation was laid for its admission. The entire evidence of damages lacked foundation under the

exceptions to the hearsay rule and through competency of the witnesses through which it was introduced.

ARGUMENT

POINT I

A COMMERCIAL TENANT UNDER A MONTHLY TENANCY ACCEPTS THE PREMISES "AS IS", AND THE LANDLORD OWES NO DUTY OF PROTECTION TO THE TENANT.

The plaintiffs, conducting a jewelry business, were renting from appellant Brown on a monthly tenancy; they did not want a lease. (R.425). There was no warranty regarding the premises ever extended by the appellant Brown. In Jesperson v. Deseret News, 119 Ut. 235, 240-41, 225 P.2d 1050, 1053 (1951), this court set forth the landlord's duty to a tenant regarding leased premises. This court held:

> ...The condition of the premises was equally apparent to both lessor and lessee. No warranty was included in the lease that the premises would sustain the weights proposed to be placed on it by the lessee. Under such circumstances, the tenant took the risk of the premises as they were. See Powell v. Johnny Hughes Orphanage, supra, (148 Virginia 331, 138 S.E. 367), wherein the court quotes from 16 R.C.L. Section 270 as follows: 'In the absence of warranty, deceit or fraud on the part of the landlord, the rule of caveat emptor applies to the lease of the real estate, the control of which passes to the tenant to make examination of the demised premises to determine their safety and adaptability to the purpose for which they are hired.'

This is the general rule and has been recognized by other jurisdictions in cases of similar facts. In Robiceaux v. Roy, 352 So.2d 766 (Louisiana, 1977), the Louisiana court addressed the very issue before this court. The plaintiff in that case had leased space from the landlord to conduct a jewelry business. The landlord rented adjoining premises to another individual. Shortly afterwards, unknown persons broke through a common wall between the two premises. The jewelry store was burglarized. The Louisiana court held that the landlord was not liable for the burglary because the landlord had no duty to protect the tenant against disturbances by third persons with no right to enter. See also, Peter Piper Tailoring Company v. Dobbin, 192 S.W. 1044 (Mo. 1917) for a recitation of the same rule.

The plaintiffs knew reconstruction was taking place, because they had been upstairs and could actually hear the work in progress. (R.463). Mr. Brown had also told Mr. Virgil Steadman the general terms about the reconstruction process. (R.346). No intrusions from the repair work occurred to the plaintiffs' rented premises. (Id.). During the repairs, Mr. Brown did penetrate the floor to an apartment above the plaintiffs' store. (R.647-50). The intrusion did not go through the lath

and plaster which separated the premises leased by the plaintiffs from the apartment floor nor through the false ceiling of the plaintiffs' store. The false ceiling was directly below the lath and plaster layer. On the day of the burglary, the plaintiffs were renting exactly what they had been renting during their entire tenancy--a jewelry store from the floor to the false ceiling and up to the lath and plaster. No warranty had been extended regarding their security. They could have ascertained the adequacy of the premises better than appellant Brown. In fact, Mr. Brown assumed the plaintiffs had extended their burglar alarm system through the entire ceiling. (Id.). Mr. Virgil Steadman knew of a previous burglary attempt which had occurred through the ceiling years before Mr. Brown bought the building. It was he who had informed Mr. Brown of this attempt. (R.453-54, 455-56, 651). The only protective steps taken were to "bug" only a portion of the ceiling instead of the entire ceiling because of the costs involved. (Id.). Therefore, the plaintiffs took the risks of the premises as they were. They had knowledge superior to appellant's knowledge and took no further steps to protect themselves.

POINT II

A LANDLORD IS NOT THE INSURER OF THE SAFETY OF HIS TENANT AND OWES NO DUTY TO PROTECT HIM FROM THE CRIMINAL ATTACKS OF THIRD PARTIES.

This court has decided no cases bearing directly on this point. Other jurisdictions have considered similar issues. In King v. Ilikai Properties, 632 P.2d 657 (Hawaii, 1981), the Hawaii Supreme Court affirmed summary judgment for a landlord when sued by a tenant who had been assaulted in the landlords' condominium. The court held absent a special relationship between them, the landlord had no duty to protect the plaintiff-tenant from criminal attacks by third parties. In Davis v. Allied Supermarkets, Inc., 547 P.2d 963 (Okla. 1976), the Oklahoma court affirmed summary judgment for the supermarket when sued by a customer who was assaulted in the parking lot. The court held no duty was imposed upon the store to protect against the criminal acts of third parties. The court held the store was not an insurer of the safety of its customers. The closest Utah case is Gustaveson v. Gregg, 655 P.2d 693 (Utah 1982), where this court affirmed the trial court's reversal of a jury verdict in favor of a patron of a bowling alley. The patron was assaulted by a member of another bowling team.

The proprietor was aware of the fact the plaintiff had reported tension and animosity between his team and the assailants' team. This court held:

> The proprietor of a public amusement has no duty to anticipate violence when neither the person exhibiting the violence nor others connected with him have previously engaged in any potentially violent activities. A proprietor has a duty to use ordinary care and diligence to protect patrons, but this duty does not extend to becoming an insurer of their safety.

Id. at 695.

In the instant case, the plaintiffs seek to hold appellant Brown as an insurer of their safety. The record is devoid of any evidence of the criminal nature of the first intruders in the apartment and their connection, if any, with the burglars. Mr. Brown assumed that transients may have been seeking shelter from the storm in the first instance. He checked and secured the room, personally and through his manager. In both instances there was no evidence of any attempt to penetrate into the jewelry store. (R.335, 350, 370-71, 377-78, 388). In fact, Mr. Brown was a victim of the burglary in that the unknown parties broke a locked window to enter the apartment. They then broke through

the lath and plaster layer. (R.350, 371, 656; Exhibit 1-I, 20). In the first intrusion, there was no evidence of any criminal activity. Appellant Brown used ordinary care and diligence. He locked the windows and locked the door. Moreover, the court committed reversable error when it refused appellant Brown's Instruction Number 22 (R.186), advising the jury the landlord is not an insurer of the safety of the tenants, and Instruction Number 21 (R.185), that the landlord is not obligated to protect the tenant from the criminal acts of third parties.

The trial court failed to give the instructions requiring a special duty to be proven before liability may be imposed on the landlord. Without the particular instructions, sought by appellant Brown, the jury was left with the impression that a landlord was an insurer or guarantor of the safety of the tenant. Moreover, the plaintiffs produced no evidence of the landlord's duty of care. No such standard is articulated in the record or in the instructions.

POINT III

THE PROXIMATE CAUSE OF THE PLAINTIFFS' INJURIES WAS THE INTERVENING CRIMINAL ACT OF THIRD PARTIES FOR WHICH THE APPELLANT CANNOT BE LIABLE.

Other jurisdictions have considered similar issues to the case at bar. In McCappin v. Park Capital

Corporation, 126 A.2d 51 (N. J. 1956), the court faced a problem of a tenant who had lost money from her apartment when no forced entry had been made. The landlord's superintendent had kept the keys to all the apartments on a peg board, which eventually was moved to an area of common access. Several keys were found missing, including the key to the plaintiff's apartment. At approximately the same time of that discovery, her apartment was entered without force and she suffered a loss. The trial court had found for the tenant and the appellate court reversed. It held that no proximate cause had been established between the missing keys and the loss of the money and granted judgment to the landlord. Similarly, in Panglorne v. Weiss, 90 A. 1024 (N. J. 1914), a New Jersey court held the landlord was not liable to a tenant where the landlord had removed the lock to the tenant's door in order to effect repairs when a burglary occurred. Additionally, in Andrews v. Kinsel, 40 S.E. 300 (Georgia, 1901), the court refused relief to the tenants based on a negligence theory where the landlord had left the windows open in an adjoining tenant's premises, after having removed for purposes of repair of partition between the plaintiff's premises and the other tenant's premises. The court held that the

intervening theft, not the landlord's negligence was the proximate cause of the loss. In the instant case, testimony demonstrates that Mr. Brown acted reasonably. He had cut holes in the apartment floor in order to effect repairs. He was attempting to locate leaks and was eventually reconstructing the entire room including the plumbing. (R. 382, 645). There is no evidence that he acted unreasonably.

The trial court refused to give appellant Brown's requested Instructions Numbers 20, 21, and 22, as cited supra. The court further compounded this error when it refused to give appellant Brown's Instruction Number 23 (R.187), that when two causes for an injury exist and are independent of each other, the later and intervening cause is generally the proximate cause of the loss. This instruction quotes verbatim the law in Utah in Cooke v. Mortensen, 624 P.2d 675 (Utah 1981). The court's refusal to give these instructions, especially in light of the fact the court gave Instruction Number 10 (R.97) compounded the error. The jury in effect was left with the impression that it could find liability for the criminal conduct of third parties without measuring that conduct in the context of the landlord's duty toward his tenant.

The record is devoid of any evidence the system was defeated because of the hole in the floor. In fact, the hole did not penetrate into the plaintiffs' premises; it was restricted entirely to the apartment upstairs. Mr. Brown was engaged in legitimate conduct in effecting reconstruction of the apartment. He took reasonable steps to secure the premises by locking the door and locking the windows. Notwithstanding these steps, unknown criminal parties burglarized his apartment, broke through the lath and plaster ceiling and entered the plaintiffs' premises. There, they defeated the burglary system. This was a very sophisticated group of burglars, so much so that even the security system personnel and investigating officer may not have been able to have performed the same operation. (R. 321, 580).

POINT IV

THE PLAINTIFFS FAILED TO LAY ADEQUATE FOUNDATION FOR THE ADMISSIONS OF THEIR ADMISSION OF THEIR EXHIBITS RELATING TO INVENTORY LOSSES.

Rule 702, Utah Rules of Evidence, provides:

> If scientific, technical, or other special knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto and form an opinion or otherwise.

Audrey Steadman, secretary of Steadman Enterprises, Inc., took the stand and began to testify about Exhibit 6, a list of losses sustained by the plaintiffs. (R.398, 487-88). She testified the plaintiffs assembled as a committee and began to list their apparent losses. Appellant objected to the admission of that exhibit as lacking the requisite foundation either as a document or her expertise in testifying to value. The trial court overruled the objections. She went on to testify to the value of her own diamond ring over objection foundation regarding the value. (R.410-11). She did not even know where the diamond was purchased (R.427), its value (R.428), or its cost. (R.428-30). In fact, Mr. Virgil Steadman, her husband, an officer of the corporation, testified she did not know about pricing. (R.468).

Rodney Steadman eventually was called to the stand and through him Exhibit 10 (logbook) (R. 510) was entered into evidence over the appellant's objections to foundation regarding the values. (R.510, 512). The same objection was made for Exhibits 11, 12, 13, 14, 15, 16, 17, 8, and 18. (R.510-24). These exhibits comprise the plaintiffs' entire evidence of their losses. Nowhere in the direct examination of Virgil Steadman or Rodney

Steadman was there any evidence of the foundation for compiling these exhibits or for the values contained within them. Neither was ever qualified to give any opinion regarding the values. No evidence is in the record regarding the expertise of any of the individuals who testified regarding these particular exhibits. The trial testimony mentioned lists which were never produced. None of the witnesses attempting to lay the foundation for these exhibits was ever qualified as a jeweler or an expert in the field of precious gems and metals and jewelry items. The court allowed a list to come in for value without any foundation regarding that value. There was no evidence of the "knowledge, skill, experience, training, or education," to testify to an opinion or otherwise regarding the values of any of these exhibits.

Further, the foundation for these exhibits was lacking to allow them in as hearsay exceptions. They did not qualify as records of regularly conducted activities as allowed under Rule 803(6), Utah Rules of Evidence, since no foundation was layed they were kept in the course of regularly conducted activity. In fact, they could not so qualify because the lists were constructed after the loss. Further, if these exhibits were offered

as summaries, the plaintiffs failed again to lay the necessary foundation. Rule 1006, Utah Rules of Evidence, provides that the underlying data for summaries must be produced in court. The underlying data was not produced in court in the instant case and the plaintiffs did not carry their burden of making the records available. Gull Labs, Inc. v. Lewis A. Roser Co., 589 P.2d 756 (Utah 1978). The testimony regarding values did not qualify as owners giving opinion regarding the value of their own property. No such foundation is in the record. Moreover these exhibits were values of specialized items--jewelry--which require expert testimony and the proper foundation for an individual so testifying. The record is devoid of any such foundation. Therefore, the appellant was seriously prejudiced in that the only evidence of value given at trial did not meet any of the necessary foundational requirements.

CONCLUSION

There is no duty owed toward a tenant in a commercial monthly tenancy by the landlord. The tenant accepts the premises "as is". The landlord cannot be the guarantor or insurer of the safety of the tenant. The landlord cannot be required to protect the tenant from the world at large. The evidence is deficient in showing

what the landlord's duty of care was under the circumstances. The record is totally devoid of any evidence that the appellant landlord acted or failed to act unreasonably. In fact, the evidence is just the opposite. He was engaged in a legitimate and socially useful operation of reconstructing an apartment. He locked and secured the doors and windows to that apartment. Unknown burglars broke into his apartment and then broke through a ceiling layer into the respondents' premises, a premises inadequately protected by a burglary alarm system of which only they knew its particular shortcomings, with the exception of the burglars themselves.

The trial court committed reversible error when it failed to grant the appellant's motion for a directed verdict at the close of the respondents' case. It allowed the case to go to the jury without articulating for them the standard of care under a commercial tenancy. It failed to instruct the jury about the special circumstances of such a tenancy. Moreover, the trial court allowed the matter to go to the jury without any instructions regarding the duty owed by a landlord to a tenant. The court refused the appellant's instructions submitted on that duty and gave them no guidelines to

judge the appellant's conduct. The court left the jury with the impression that the landlord, in effect, guaranteed the safety of the tenant from attacks of criminal third parties. Further, when the court refused the appellant's instruction on proximate cause and intervening cause, it gave the jury no guideline for evaluating liability for the criminal acts of third parties.

Therefore, appellant asks this Court to reverse the judgment and order the trial court to enter judgment in its favor.

DATED this 6 day of December, 1985.

HANSON, DUNN, EPPERSON & SMITH

T. J. TSAKALOS
Attorney for Appellant

ADDENDUM

Instruction No. 10, given by the Court (R. 97)

Instruction No. 20, requested by appellant (R. 184)

Instruction No. 21, requested by appellant (R. 185)

Instruction No. 22, requested by appellant (R. 186)

Instruction No. 23, requested by appellant (R. 187)

CERTIFICATE OF SERVICE

I hereby certify that I hand delivered four true and correct copies of the foregoing BRIEF OF APPELLANT on this 6 day of December, 1985, to:

Lee Bishop
Attorney at Law
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Salt Lake City, Utah 84111

T. J. Sakalos

INSTRUCTION NO. 10

The proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury, and without which the result would not have occurred. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the injury.

Proximate cause is that cause which in natural and continuous sequence produces the injury without which the result would not have occurred. The fact that the instrumentality which produced the injury was criminal conduct of a third person would not preclude a finding of proximate cause if the intervening agency was itself a foreseeable act.

INSTRUCTION NO. 20

Plaintiffs rented the premises under a monthly tenancy and not under a written lease.

Under Utah law, a tenant of a commercial building accepts the risks of the premises "as is" and the landlord owes no duty of protection toward him.

It is, therefore, the duty of the tenant to examine the premises and determine their suitability.

Jesperson v. Deseret News Publishing Company, (Ut. 1951) 225 P.2d 1050; Wolfe v. Wite, (Ut. 1948) 197 P.2d 125.

INSTRUCTION NO. 21

A landlord has no duty to protect a tenant from the criminal attacks of third parties.

King v. Ilikai Properties, (Haw. 1981) 632 P.2d 657.

INSTRUCTION NO. 22

A landlord is not an insurer of the safety of his tenants. He has no duty to anticipate the criminal conduct of third parties.

Robicheaux v. Roy, (La. 1977) 352 S.2d 766; McCappin v. Park Capitol Corporation, (N.J. 1956) 126 Atl.2d) 51; Panglorne v. Weiss, (N.J. 1914) 90 Atl. 1024; Andrews v. Kinsel, (Ga. 1901) 40 S.E. 300; Teallv v. Harlow, (Mass. 1951) 176 N.E. 533.

INSTRUCTION NO. 23

When there exists two possible causes for an injury, and these causes are independent of each other, the later and intervening cause is generally to be viewed as the proximate cause of the ~~accident~~ loss.

Cooke v. Mortensen, (Ut. 1981) 624 P.2d 675.